BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY ANDREWS Claimant	)	
VS.	)	
PREMIUM FEEDERS, INC. Respondent	)	Docket No. **1,051,913**
AND	)	
AUTO OWNERS MUTUAL INS. CO. Insurance Carrier	)	

ORDER

Claimant requested review of the August 31, 2011, Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on December 1, 2011. Board Member Tom Arnhold recused himself from this appeal and the Workers Compensation Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem.

APPEARANCES

Matthew L. Bretz of Hutchinson, Kansas, appeared for the claimant. Michael T. Halloran of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered an accidental injury at work for respondent on December 26, 2008, while sorting cattle to be loaded for shipment. Claimant received emergency room treatment for his left knee complaints and was provided temporary total disability compensation. But when claimant later sought additional medical treatment the insurance carrier told him no further treatment would be provided. The claimant then filed

an application for hearing seeking payment of medical expenses, additional temporary total disability compensation and permanent partial disability compensation. Respondent denied claimant made a timely written claim for compensation.

The Administrative Law Judge (ALJ) found claimant failed to sustain his burden of proof that he provided timely written claim to respondent.[1]

Claimant requests review of whether or not claimant provided timely written claim pursuant to K.S.A. 44-520a. Claimant argues he gave timely written claim when he delivered an off-work slip to respondent sometime on or before January 8, 2009.

Respondent argues that claimant failed to establish timely written claim as required by K.S.A. 44-520a. Respondent further argues the claimant's stated intent in providing the off-work slip was just to let respondent know why he was missing work and that he had not quit work.

The sole issue raised on review is whether claimant provided timely written claim pursuant to K.S.A. 44-520a.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working as a cowboy for respondent in October 2008. His job duties included riding the pens to check the cattle, attending to the sick cattle, sorting the cattle and loading the cattle onto trucks.

On December 26, 2008, claimant was assisting loading cattle onto a truck. While sorting the cattle a steer ran into a gate causing it to hit claimant's left knee. Claimant felt an immediate onset of pain in his left knee. Claimant was taken to the emergency room in Belleville. At the hospital claimant's knee was x-rayed which was read as negative. Claimant was diagnosed with knee strain and provided a knee brace and pain medication.

Claimant took a couple of days off and then tried to work although his knee remained painful. When his pain did not improve the claimant discussed his ongoing pain with Bobby Craig who agreed it would be a good idea to get a second opinion. Bobby Craig's employment status with respondent was not established in the evidentiary record. But claimant testified that respondent knew he was going to the Hutchinson Clinic:

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[1] It is unclear what authority authorized the ALJ to award temporary total disability compensation after he determined timely written claim had not been made and the claim barred.

> Q. What was your employer's -- I mean, did they know you were going to the Hutch Clinic?
>
> A. Yes.
>
> Q. And how do you know that?
>
> A. Bobby . . . I'm trying to recall his last name. Bobby Craig, I believe, I had visited with him about it and told him I would like to go get it looked at by somebody else, and he agreed that was probably a good idea.[2]

Claimant then sought a second opinion at the Hutchinson Clinic on January 6, 2009. An MRI of claimant's left knee on January 6, 2009, was read as showing bone contusion and joint effusion. Claimant was prescribed crutches and placed in a full knee brace from his hip to ankle. Claimant was also restricted from working for two weeks. Claimant then took the off-work slip to respondent and explained he wanted to show that he had not quit work but was told to stay off work by the doctor. Claimant testified:

> Q. So, in any event, when you received Claimant's Exhibit 3, what did you do with it? I'm sorry, Claimant's Exhibit 2, what did you do with it, if anything?
>
> A. Within the . . . I don't believe it was that day, but within the next day, two days, maybe, I went back to Premium Feeders, and at that point Lairmore had put me on crutches and a full knee brace from hip to ankle, and turned this in to Bobby Craig.
>
> Q. And what did he tell you, if anything?
>
> A. Stay off work for a couple of weeks.
>
> Q. What was the purpose of turning that in to Bobby Craig?
>
> A. So they would know that I didn't quit, and that the doctor told me I wasn't supposed to work.[3]

On January 13, 2009, claimant received a letter from Sara Slaybaugh, a "work comp specialist" for respondent's insurance carrier. The letter noted the insurance carrier had received notice of an injury and further explained the amount of compensation benefits claimant would receive for his lost time until released to return to work by his doctor.

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[2] R.H. Trans. at 16-17.

[3] *Id.* at 17.

Claimant was asked if he had any idea how the insurance carrier received notice of his claim or notice there was an injury and he responded by his giving Bobby Craig the off-work slip. Claimant testified:

> Q. Any idea how they received notice of claim, or notice that there was an injury?
>
> **MR. HALLORAN**: I'm going to object, Your Honor, speculation.
>
> **THE COURT:** Well, he can ask if he knows. I haven't heard a response to the question if he knows. Do you know how they knew that a claim had been submitted or an accident reported?
>
> **THE CLAIMANT:** By me giving Bobby the work slip.[4]

On March 3, 2009, Dr. Lairmore released claimant to return to light duty work. Respondent was going to provide claimant a job driving a manure truck but claimant was unable to do that job because of a DUI and he did not have a valid driver's license. And respondent did not have any other light-duty jobs to offer. So claimant looked for other work and started working for Phil Knight, a farmer, on April 30, 2009. Claimant later went to work for another cattle operation performing the same work that he had performed for respondent. The claimant's temporary total disability benefits were terminated after March 11, 2009.

On October 13, 2009, claimant returned for his follow-up appointment with Dr. Lairmore. At that time claimant was still experiencing problems with his left knee. Claimant was diagnosed with a left knee medial cruciate ligament strain and left medial femoral condyle contusion. A repeat MRI of the left knee was suggested. Claimant then requested additional treatment and he received a letter from the insurance carrier denying his request. The October 29, 2009 letter from Ms. Slaybaugh provided in pertinent part:

> Recently you requested additional treatment for the above injury. I have reviewed the supplied doctors note from 10-13-09, it appears you have been diagnosed with a new aliment, [sic] left knee medical [sic] cruciate ligament strain.
>
> The last time you received treatment was back on 03-03-09, this was not the diagnoses. Thus, it appears to be a new injury and not related to the injury on 12-08-08. Therefore, your request for treatment and diagnostic images is being declined.[5]

In February 2010 claimant went to Dr. Goins for a second opinion and it was recommended that claimant undergo a diagnostic arthroscopy of his left knee. On

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[4] R.H. Trans. at 19.

[5] *Id.*, Resp. Ex. A.

March 17, 2010, Dr. Lairmore performed a diagnostic left knee arthroscopy, plica excision, and medial synovectomy. Claimant was off work from March 17, 2010, through March 29, 2010. At a March 25, 2010, follow-up appointment with Dr. Lairmore, claimant reported his knee was 80 percent better and he was released on March 29, 2010, to return to his work as a cowboy.

Claimant filed an application for hearing with the Division of Workers Compensation on August 3, 2010.

Timely Written Claim

The written claim statute, K.S.A. 44-520a(a), provides in part:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[6] The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.[7] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In *Fitzwater*[8], the Kansas Supreme Court described the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

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[6] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[7] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[8] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

In addition, the Board considers the Supreme Court's opinion in *Ours*[9] to be instructive.

> The written claim required by K.S.A. 1972 Supp. 44-520a to be served upon the employer under the Workmen's Compensation Act need not be signed by or for the claimant. The written claim may be presented in any manner and through any person or agency. The claim may be served upon the employer's duly authorized agent.[10]

In *Lawrence*[11], the Kansas Court of Appeals noted:

> An employee's procurement of medical treatment from his or her own physician will not toll the statute of limitations for the purpose of filing a written claim for compensation unless there is evidence that the employer directed, suggested, or otherwise authorized the employee to seek medical attention from his or her own physician.[12]

The claimant argues the off-work slip from Dr. Lairmore dated November 6, 2009, was presented to respondent and constituted written claim. Claimant further argues the fact that the insurance carrier wrote claimant that it had been notified of the injury and started temporary total disability compensation payments after claimant presented the off-work slip further corroborates his assertion the off-work slip constituted written claim. Claimant testified that his intent in presenting the off-work slip was to notify respondent that he had been taken off work by his doctor and to explain that he had not quit his employment. And claimant further explained that the insurance carrier was aware of his claim because he had submitted the off-work slip to Bobby Craig.[13] When claimant turned the off-work slip into Mr. Craig he was told to stay off work for a couple of weeks.

Respondent had notice of claimant's accidental injury and provided medical treatment at the emergency room. Upon receipt of the off-work slip, the insurance carrier began making temporary total disability compensation payments. Clearly, the insurance carrier treated the off-work slip as a claim for compensation. The Board finds that upon consideration of the claimant's testimony it is held that he not only provided the off-work slip to respondent to notify them that he would be off work for two weeks and had not quit his employment but also, as he explained, to notify respondent and its insurance carrier

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[9] *Ours v. Lackey,* 213 Kan. 72, 515 P.2d 1071 (1973).

[10] *Id*. at Syl. ¶ 4.

[11] *Lawrence v. Cobler*, 22 Kan. App.2d 291, 915 P.2d 157, *rev. denied* 260 Kan. 994 (1996).

[12] *Id.* at Syl. ¶ 5.

[13] Mr. Craig's authority to receive the off-work slip on behalf of respondent was not disputed.

of his claim for compensation. Consequently, claimant has met his burden of proof that he made timely written claim. The ALJ's Award is reversed and the matter remanded for determination of the remaining issues.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[14] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated August 31, 2011, is reversed and remanded for determination of the remaining issues.

IT IS SO ORDERED.

Dated this _____ day of January, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Michael T. Halloran, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[14] K.S.A. 2010 Supp. 44-555c(k).